No. 83-2004

IN THE

Supreme Court of the United States

October Term, 1983

MATSUSHITA ELECTRICAL INDUSTRIAL CO., LTD., et al.,

Petitioners

v.

ZENITH RADIO CORPORATION and NATIONAL UNION ELECTRIC CORPORATION,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENTS IN RESPONSE TO THE BRIEF OF THE UNITED STATES AS AMICUS CURIAE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

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Respondents file this supplemental brief in reply to the Government's brief *amicus curiae*.

I. The Government's brief is based on two serious misinterpretations of the Court of Appeals' opinions in these cases: first, that the Court of Appeals adopted a standard of sufficiency of conspiracy evidence that conflicts with *First National Bank v. Cities Service Co.*, 391 U.S. 253 (1978), and, second, that the Court of Appeals held that private conduct compelled by a foreign government can be a "predicate for liability."

(A) The Court of Appeals' opinion in these cases — where the Government concedes there is *direct* evidence of petitioners' conspiracy (Brief at 9)—clearly does not "conflict" with *Cities Service*, in which, as the Government also concedes, the plaintiff sought to prove conspiracy "*solely on the basis of circumstantial evidence in the form of parallel conduct.*" (Brief at 8).

(B) The Court of Appeals simply never held that private conduct compelled by a foreign government can be a "predicate for liability."

These misinterpretations undercut the Government's suggestion that "plenary review" of the antitrust segment[1] of these cases might be appropriate at the interlocutory stage.

II. The Government refers to trumped-up, identically-phrased expressions of alleged "concern" from several foreign governments, all based on the identical misinterpretation and prepared by curious coincidence in the same two-week period in November, 1984, *one year* after the Court of Appeals' decision and after this Court invited the Government to express its views. That the Government would seriously rely on such obviously orchestrated material speaks for itself.

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1. The Court of Appeals entered two judgments on December 5, 1983--one with respect to the antitrust segment of the cases (*"the Antitrust Opinion"*) and one with respect to respondents' separate claims under the Antidumping Act of 1916 (*"the Antidumping Opinion"*). (224a-228a and 229a-233a). *See*, Respondents' Brief in Opposition at 9-10, 29-30. The Government takes "no position on the correctness" of the Court of Appeals' conclusion that petitioners were not entitled to summary judgment on respondents' Antidumping Act claims. (Brief at 11, n.12). Petitioners presented no question for review from the separate Antidumpting Act judgment in the Court of Appeals.

The Government acknowledges, therefore, that respondents' claims under the Antidumping Act of 1916, 15 U.S.C. 72, which include claims of petitioners' *unilateral* violation of that Act, must proceed to trial in any event when it states (Brief at 7, n.7) that, at best, "guidance from this Court concerning the evaluation of evidence of the alleged antitrust conspiracy would assist on remand in dealing further with the issue of specific intent in connection with the antidumping claims." Since the record contains abundant evidence of petitioners' fraud, guilty knowledge, and other evidence of specific intent that satisfies that intent requirement, independent of the conspiracy evidence, respondents' individual antidumping claims would be unaffected by any ruling on the conspiracy issue and would proceed to trial.

III. The Government essentially admits that this litigation is *sui generis*,[2] and the Court of Appeals' decision has no important implications for either antitrust policy or foreign trade policy.

(A) If the sufficiency of the conspiracy evidence in these cases ever warranted review by this Court, it can be more properly and adequately reviewed *after* a trial. No important antitrust policy requires interlocutory review in this Court. The Government's concern that lawful competition might be discouraged by the Court of Appeals' decision is also unwarranted. Foreign competitors who, unlike petitioners, compete lawfully and do not belong to predatory foreign price-fixing cartels that fix prices in closed foreign markets abroad, and engage in collusive dumping in the United States, and in systematic customs fraud schemes to shield their dumping from detection by the United States Customs Service, have no reason to fear United States law. The Government's far-fetched prediction that the Third Circuit's reversal of summary judgment in its Antitrust Opinion will somehow retard judicial use of summary judgment procedures in antitrust cases is a ridiculous afterthought that involves no antitrust policy issue of practical significance. The Government has cited not a single case to support its prediction. If anything, the Court of Appeals' Antitrust Opinion streamlines summary judgment procedures in complex cases.[3]

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2. The Government rejects (by declining to endorse) petitioners' claim of a circuit "conflict" on any question of law and concedes that the antitrust claims in these cases involve no commonly recurring fact pattern such that a decision by this Court might provide guidance to the lower courts in deciding other similar cases.

3. The Court of Appeals *approved* the summary judgment procedure the district court devised — a procedure which, combined with preclusive pretrial order procedures, transforms Rule 56 summary judgment motions into the functional equivalent of Rule 50(a) directed verdict motions by relieving antitrust defendants of their normal F.R.Civ.P. 56(c) burden of producing conclusive evidence by affidavit to rebut the charges of a complaint and by permitting the trial court to test the sufficiency of a private antitrust plaintiff's proofs prior to a trial. (64a).

(B) The Government's suggestion that this Court make a premature ruling on petitioners' false issue of "foreign sovereign compulsion" on this interlocutory record is unsound. Petitioners chose not to press that issue in the Court of Appeals, telling that Court that it was "*obviously of no importance on this appeal*."[4] The issue was invented only in petitioners' recent frantic search for an issue that sounded like it might be something important. Having been elaborately importuned *seven months* ago by these same Japanese petitioners and by representatives from Japan,[5] the Government nonetheless refused at that time to become involved in any of this business and *declined* to confer any patina of certworthiness by supporting the petition. The Government offers no reason why what was unimportant then has any more "practical importance" now.

IV. The Government's substantially different Questions do not alter the fact that review of the sufficiency of the evidence below necessarily entails examination of a substantial factual record.[6] The Court of Appeals devoted *fourteen months* to that task — a project the Government evidently has not even undertaken itself. There is no good reason why this Court should now resift through the forty-odd volumes of evidence simply to second-guess Chief Judge

4. Transcript of Oral Argument Before the Court of Appeals for the Third Circuit on October 22, 1982, at 88-89.

5. In May and June, 1984, the Antitrust Division met with petitioners' counsel and with some representatives from Japan who urged the Antitrust Division to support the petition for certiorari. The Government received the May 29, 1984 Note Verbale from Japan at that time. *See*, Brief Amicus Curiae of the Government of Japan at 1a. Petitioners' roadshow also played at the State Department. Notwithstanding all this prodding and inducement, the Government properly elected not to support the petition at that time.

6. As petitioners' own counsel told the Court of Appeals: "*You are going to have to look at the record, Your Honor. We took months doing it and the lower Court took months doing it. I don't know how this court has the time to do it.*" (Transcript of Oral Argument Before the Court of Appeals for the Third Circuit on October 12, 1982, at 97-98).

Seitz and Circuit Judges Gibbons and Meskill, who unanimously resolved these purely factual issues against petitioners.

I. THERE IS NO "CONFLICT" WITH *CITIES SERVICE*.

1. Respondents' complaints charge a *single* continuing conspiracy to establish a differential between the prices of petitioners' consumer electronic products in the Japanese market (a market which for all practical purposes is closed to competition from foreign producers of television receivers, including respondents and other American television manufacturers)[7] and the prices of petitioners' television and other consumer electronic products imported and sold within the United States--a conspiracy petitioners designed and carried out for the ultimate purpose of driving down and holding down United States price levels to put their United States competitors out of business and thereby to monopolize United States trade and commerce in these products. Petitioners' price levels in the closed Japanese market, their sharply lower United States import price levels, and their collusion in establishing and maintaining the large disparity between these price levels, are integral components of the single Sherman Act conspiracy charged in these cases.

2. The Government concedes there is *direct* evidence[8]

7. The Court of Appeals pointed to the extensive evidence barriers to competition by American or other non-Japanese manufacturers in the Japanese home market. (170a).

8. This evidence includes even an admission to that effect during oral argument by petitioners' liaison counsel in the Court of Appeals (174a). It also includes signed admissions of some of petitioners' executives, business diaries, memoranda and minutes of meetings and much other direct evidence of a conclusive nature concerning petitioners' secret collaboration on pricing, production, and shipment of consumer electronic products, all of which the Court of Appeals held to be admissible. Other highly probative documentary evidence includes a memorandum of a December 1966 meeting of petitioners' "Statistics Committee" of the Electronic Industries Association of Japan, which is reproduced in translation in the addendum to this brief. (A-1 to A-3).

of petitioners' horizontal[9] and vertical price-fixing activities in Japan and circumstantial evidence of United States import price collusion, but asserts that the Court of Appeals' unanimous decision is "inconsistent" with *First National Bank* v. *Cities Service Co.*, 391 U.S. 253 (1968). In *Cities Service*, as the Government itself realizes, the Court spoke only of the sufficiency of evidence "to prove the existence of an anticompetitive conspiracy *solely on the basis of circumstantial evidence in the form of parallel conduct*." (Brief at 8). This plainly is not such a case. The alleged "conflict" with *Cities Service* is manufactured and obviously does not exist.

3. The Government attempts to stretch *Cities Service* into a stringent standard to be applied even in *direct evidence* cases,[10] but to do so the Government must outrageously distort the Court of Appeals' Antitrust Opinion and the record. To push this square evidentiary peg into its round conceptual hole, the Government is forced to dismember petitioners' conspiracy by artificially constructing *two* "conspiracies"—a "Japan-side conspiracy" and a separate "United States-side conspiracy." Ignoring the direct evidence, the Government apparently suggests that the circumstantial evidence of the "United States-side conspiracy" must be viewed *separately*, and that *separately* it should satisfy some unarticulated but more exacting "standard" which the Government claims to find in *Cities Service*, even though in that case conspiracy was predicated, as the Government says, "*solely on the basis of circumstantial evidence in the form of parallel conduct*."[11]

9. The Government repeatedly mischaracterizes the price-related direct evidence as evidence only of "*resale price maintenance*." (Brief at 3, 9, 10). There is extensive record evidence of petitioners' *horizontal* price-fixing involving *ex-factory* prices.

10. The absurdity of the Government's suggestion is nowhere more starkly apparent than in its restatement of petitioners' first Question Presented.

11. Besides ignoring the direct evidence, the Government also incorrectly assumes that the only circumstantial evidence of its artificially constructed "United States-side conspiracy" is evidence of "parallel conduct." The Government overlooks the extensive evidence of *motive* and circumstantial evidence *other than* the "parallel conduct" evidence. The Court of Appeals catalogued (169a-172a) many other types of evidence, which it summarized as showing a "set of economic circumstances providing a strong incentive for horizontal price stabilization, the feasibility of such a program, an opportunity to meet for the purpose of agreeing on it, and pricing activity in the export market consistent with the existence of such an agreement". (172a). The Court then considered the combination of this evidence and the *direct evidence* of petitioners' collusion on Japanese market prices (173a), as well as considerable evidence of collusion on export pricing (176a-179a), including evidence which, together with the other evidence, "would permit a fact finder *to infer a motive to sell at prices low enough to eliminate competition in the United States market by American firms*" (177a), *and evidence that petitioners had a motive "for entering a conspiracy to sell at low prices."* (177a).

As the Court of Appeals realized, the evidence of motive and intent, the many other kinds of circumstantial evidence (besides parallel acts), and the abundant direct evidence of conspiracy removed this case from the class of anti trust conspiracy cases where liability is predicated solely on the basis of otherwise ambiguous circumstantial evidence in the form of "parallel conduct". The direct and circumstantial evidence here unambiguously established petitioners' conspiracy.

4. The Government's dismemberment of petitioners' conspiracy violates the basic teaching of *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962), that "[t]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." 370 U.S. at 699. The Court of Appeals properly viewed the conspiracy evidence as a whole, and stated that "[h]ere, direct and circumstantial evidence may validly be considered to cumulate and reinforce with respect to the ultimate facts in issue." (163a). In doing so, it explicitly followed *Continental Ore*. (166a).

II. THE COURT OF APPEALS NEVER REACHED THE "SOVEREIGN COMPULSION ISSUE".

5. If any important foreign policy implications existed at the interlocutory stage of these cases, the Government

surely would have brought them to the Court's attention seven months ago, instead of rejecting the opportunity to do so. The Government's hypothetical rhetoric[12] concerning this bogus issue now has a hollow ring.

6. The Court of Appeals' opinions contain no holding that conduct compelled by a foreign government can be "a possible predicate for liability" under United States antitrust law. What petitioners once claimed they were "compelled" to do is forming a cartel to fix "minimum prices" at which certain kinds of television receivers were to be imported into the United States *during the 1960s and early 1970s*. Petitioners did not contend that they were compelled to sell in the United States *at* the "minimum prices"; by definition petitioners were free to sell at any United States import prices *above* those "minimum prices." They claimed only that they were "compelled" not to sell *below* those prices. Nor did petitioners ever contend they were "compelled" to sell their television receivers in the Japanese market at prices that were *higher* than the prices at which they sold their television receivers in the United States, *i.e.*, to dump. But petitioners did sell television receivers at United States import prices below the "minimum prices," and they colluded with one another and with certain large United States importers of these goods uniformly and falsely to report to U.S. Customs those "minimum

12. The hypothetical air of the Government's observations on this score is reflected in the hypothetical terms in which it couches them, *e.g.*, its suggestion that, because of uncertainty about the meaning of the Court of Appeals' Antitrust Opinion denying summary judgment, Japan and other foreign governments "*may*" be reluctant to accommodate proposals by the United States to resolve trade controversies by voluntary restraint agreements, and by its unsupported speculation that such a response "*could*" deprive the United States of a useful tool in international trade disputes. The explanation for this cagey terminology lies in the fact that intervening reality has already refuted this hypothesis. The Government has recently successfully concluded "voluntary restraint" arrangements with the Western European countries and Japan involving steel imports. The Court of Appeals' decision was no impediment to those arrangements.

prices" as the transaction prices, instead of the *actual lower prices*. They did this to conceal the fact that they were dumping, thus making it possible for them acting in concert to continue to do so.

The Government acknowledges that the Court of Appeals could appropriately "consider the existence of compelled conduct as evidence that some other alleged event has taken place" (Brief at 18, n.23), but incorrectly asserts that the Court of Appeals "relied on the check price agreement as one of the crucial pieces of evidence of the alleged conspiracy that would preclude the grant of summary judgment." (Brief at 5). There is no such holding by the Court of Appeals. On the contrary, the Court of Appeals explicitly "*assume[d]* without deciding that a government-mandated export cartel arrangement fixing minimum export prices would be outside the ambit of" the Sherman Act (188a), and "*assume[d]* that the minimum price agreement, of which all the Japanese defendants were members, was mandated by the Ministry of International Trade and Industry." (220a).[13] The Court said that "[p]laintiffs offer this evidence to show that *defendants used the prices in that agreement as reference prices*." (220a) (emphasis added). The Court of Appeals thus referred to petitioners' written "minimum price" agreements as evidence that "some other alleged event has taken place"—a use the Government specifically acknowledges to be entirely appropriate. (Brief at 18 n.23).

Properly understood, neither of the Court of Appeals' Opinions involves any question that could conceivably have a bearing on contemporary trade issues.

III. THE ADMISSIBLE EXPERT OPINION EVIDENCE OF CONSPIRACY INDEPENDENTLY SUFFICES.

7. The Government takes no position on the admissibility of respondents' expert economic opinion evidence. (Brief at 6, n.6). But respondents' principal economic experts summarized under oath their opinions (which the

13. As the Government concedes. See Brief at 5, 16.

Court of Appeals' held would be admissible at trial) that petitioners conspired. The expert opinion evidence of conspiracy sufficed by itself to defeat petitioners' summary judgment motions. Review by this Court limited to the first two questions of the petition could not alter the Court of Appeals' separate antitrust judgment below.

CONCLUSION

Review of the fact-bound antitrust segment of this *sui generis* litigation would have no practical significance beyond these cases, which present no clear-cut or frequently recurring legal issue for the Court to decide. Piecemeal interlocutory review of the antitrust segment would not involve respondents' distinct Antidumping Act claims (or, for that matter, petitioners' multimillion-dollar counterclaims pending against Zenith in the district court), which must be tried in any event, as the Government acknowledges. (Brief at 5 n.3). The trial of the antidumping claims should not be further delayed by premature review of the interlocutory rulings on the Sherman Act conspiracy segment of the cases.

The petition for certiorari should be denied.

Respectfully submitted,

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ADDENDUM

Confidential to Outside the Company

(Han-Sui) Ma-Ko. 1-143
[Sales Promotion]

TO: (Ko-Kei) Cho [Chief, the Plant Accountants' Section]

January 6, 1967

On the Matter of Reporting of Production and Shipments in value of Color Television Sets for the MITI Current Production Statistics

(Han-Sui) Ma.
[Sales Promotion]

Chief Ma. Section (Han-Sui) [Sales Promotion]	(Han-Sui) Ma. [Sales Promotion]
Jan. 6, 1967	Jan. 6, 1967
Shiokawa	Oguri

Regarding the above-captioned matter, the following agreement was reached at the Statistics Committee of the Electronic Industries Association [of Japan] on December 26 of last year with respect to the report to the Ministry of International Trade and Industry of the actual results of color TV sets; since we wish to implement the agreement beginning with the shipment for January 1967, your cooperation is cordially requested;

TO WIT:

1. The contents of the agreement at the Statistics Committee of the Electronic Industries Association.

Although no datum is presently available which shows the domestic shipment in value of color television sets, it can be obtained by subtracting the Customs Statistics of the

Ministry of Finance from the Current Production Statistics of the Ministry of International Trade and Industry. According to this, the unit price will approximately amount to 150,000 yen, and the export unit price will show that the domestic unit price is higher than the export unit price by a factor of 2.3 or more. This, in turn, may give rise to a misunderstanding that the domestic price is too high or may engender a suspicion overseas that Japan is engaged in dumping. Therefore, it was agreed that when the report is to be filed with the MITI the amount obtained by subtracting the advertising expenses, the service expenses and the rebates from the domestic shipment in value be reported, thereby narrowing the price gap between the Current Production Statistics and the Customs Statistics.

2. An Implementation Guideline for the Reporting to the Ministry of International Trade and Industry.

Subtraction of the advertising expenses, the service expenses and the rebates will result in a price which is lower than the current invoice price by 13%. However, a precipitous drop by as much as 13% would be problematical; therefore, the implementation will be made as follows:

Beginning with the Shipment January 1967	Reduce the Domestic for Shipment in value by 4%
For the Shipment for February 1967	Reduce the Same by 8%
For the Shipment for March 1967	Reduce the Same by 8%

Thereafter, the reporting of the value obtained by sub tracting 13% from the domestic shipment in value will be continued. In the event that the Ministry of International Trade and Industry inquires about the decrease in the unit price as a consequence of implementing the above, kindly reply that the advertising expenses, the rebates and the service expenses have been subtracted in accordance with the reporting provisions for the MITI Statistics.

END.

For Office Use V192 Copies sent to: (Shu-1) Cho, (Ka-Ji) Ka Gomi Kacho [Chief] [Division] [Section Chief] [Illegible]

Japan Victor Co., Ltd.